No. 10258

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In the United States

Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY, a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER, MARCIA M. MILLER, Minors, by Reta D. Miller, Guardian,

Appellees

Appellant's Brief

Upon Appeal from the District Court of the United States for the District of Oregon

Hon. Claude McColloch, Judge

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LANE-MILES STANDISH CO.

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STATEMENT OF JURISDICTION

On September 4, 1941, plaintiffs, citizens of the State of Oregon, filed in the District Court of the United States for the District of Oregon their Amended Com-

plaint against the defendant New York Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, seeking to recover death benefits under two policies of insurance, demanding judgment against defendant for $6,000 with interest at 6% per annum, the further sum of $30.00 per month beginning as of December 3, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1954, and the further sum of $1,500 attorneys' fees on their first cause of action, and for $4,000 with interest at 6% per annum, together with the further sum of $20.00 per month beginning as of December 3, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1959, and the further sum of $1,000 attorneys' fees on their second cause of action (Amended Complaint Par. 1 and IV of first cause of action, and Par. I and II of second cause of action, and Prayer. Tr. Pages 3, 4, 8, 9 and 13).

Jurisdiction of the United States District Court is grounded on the Congressional Act of March 3, 1875, as amended (U.S.C.A. Title 28, Sec. 41, Subdivision I). Jurisdiction of this Court is grounded on the Congressional Act of March 3, 1891, as amended (U.S.C.A. Title 28, Sec. 225).

STATEMENT OF CASE

On July 13, 1939, and on February 29, 1940, defendant issued to Warren L. Miller as insured its policies of insurance numbered 17 395 774 and 17 395 775 (Pl. Ex. 1 and 2. Tr. Pages 93-116), wherein it agreed to pay upon receipt of due proof of the death of insured certain payments at various times therein mentioned.

In his application for both policies the insured agreed:

> "* * * 2. That the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application form is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither of them is authorized to accept risks or to pass upon insurability."

(Pl. Ex. 1 and 2. Tr. Pages 99 and 109.)

Both policies contained the following provisions:

"The Contract.—This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. * * * * No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. * * * *

"Payment of Premiums.—All Premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

"Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the

first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.

"Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at five per cent per annum thereon from their respective due dates. Any indebtedness to the Company at date of default, including interest thereon, must be paid, provided, however, that if it is not in excess of the Cash Surrender Value as at date of reinstatement it may remain as an indebtedness subject to the loan provisions of this policy."

Quarter annual premiums on both policies became due on October 17, 1940. On Wednesday, November 13, 1940, the insured at McMinnville, Oregon, gave to A. E. Yount, a soliciting agent of the defendant, a check payable to the order of the defendant in the amount of these quarter annual premiums. The check was dated November 17, 1940. The latter date fell on Sunday. Mr. Yount did not have the official premium receipts with him (Tr. Pages 148-149).

On the same day that he received the check Mr. Yount returned to Portland, and in the late afternoon turned the check in to the office of defendant's local cashier. On Monday, November 18, 1940, the

cashier made an entry on the Daily Premium and Commission Report (Def. Ex. 21. Tr. Page 200). On the same day he deposited the check in the United States National Bank of Portland (Oregon) (Def. Ex. 12. Tr. Page 185). On the same day he mailed to the insured the official premium receipts covering the premiums in question (Def. Ex. 10 and 11. Tr. Pages 182-183). Each receipt contained on its face the following stipulation:

> "If remittance otherwise than in cash has been made this receipt shall be void if payment of such remittance is not actually received by the Company."

The check, drawn on the First National Bank of McMinnville, Oregon, reached that bank for payment on November 20, 1940. On November 18, 1940, the date of the check, the drawer of the check had a balance on deposit of sixty-seven cents. On November 20, 1940, he had a balance on deposit of $1.05 (Pl. Ex. 5. Tr. Page 172). Payment was refused by the drawee bank because of not sufficient funds. (Def. Ex. 13 and 14. Tr. Pages 191 and 194.)

Thursday, November 21, 1940, was Thanksgiving Day. The check was returned to the United States National Bank of Portland (Oregon) on Friday, November 22, 1940. On Monday, November 25, 1940, this check with others was returned to the cashier's office

of defendant and the cashier issued defendant's check to the bank to take up this and other checks which had been returned unpaid (Def. Ex. 15. Tr. Page 196).

On the following day, November 26, 1940, the cashier by letter (Pl. Ex. 3. Tr. Page 117) returned the check to the insured advising him that the check was not honored when presented to the bank for payment, and because of that fact the premiums stood unpaid, and that inasmuch as the grace period had expired the policies lapsed and he was requested to return the official premium receipts. He was urged to immediately apply for a reinstatement of the policies by filling in complete and accurate answers on the personal health certificate enclosed. The letter then said: "Please then return the form accompanied by a remittance of $49.07 (which included interest to November 29, on the past due premiums) to this office in order that if the evidence of insurability is found to be satisfactory to the Company, this policy may be promptly reinstated." On the same day the cashier reversed the entries made on November 18, 1940, on the Daily Premium and Commission Report (Def. Ex. 22. Tr. Page 201).

The letter of November 26, 1940, was received at the McMinnville postoffice on November 27, 1940 (see Pl. Ex. 3a. Tr. Page 122), but apparently was not delivered until November 28, 1940. Unfortunately the

insured was injured on November 27, 1940, and died on December 3, 1940 (Pl. Ex. 7. Tr. Page 177).

On Thursday, November 28, 1940, after receiving defendant's letter of November 26th, Mrs. Miller secured a postoffice money order (Pl. Ex. 8c. Tr. Page 127) for the amount mentioned in the letter and forwarded this money order to the defendant. The personal health certificate mentioned in the letter was not returned to the defendant.

On Monday, December 2, 1940, the cashier returned the money order because he was not furnished with an application for reinstatement as requested in the letter of November 26th (Pl. Ex. 8a. Tr. Page 124).

This action was commenced by the beneficiaries to recover the death benefits provided in the policies. The ultimate question of fact to be determined is whether the policies were in force on the date of death of the insured. This question depends on whether the premiums due October 17, 1940, had been paid. Plaintiffs contended that the check (Pl. Ex. 4) was accepted by the defendant as full payment of the premiums. The defendant contended that the check was accepted conditionally upon the check being honored when presented for payment, and the check being dishonored when presented for payment, the policies lapsed for nonpayment of the premiums due October 17, 1940, and

had never been reinstated at the time of the death of the insured (Pre-Trial Order-Tr. Page 46-47).

Upon the trial of the case the Court admitted testimony over defendant's objections relative to conversations between the insured and the soliciting agent and also testimony relative to the forwarding of the money order (Pl. Ex. 8c) to defendant by Mrs. Miller after she had been notified that the check had been dishonored. The admission of this testimony is included among the specifications of error.

At the conclusion of testimony the defendant moved for a directed verdict (Tr. Page 213) on the ground that there was no evidence that the premiums had been paid when due or during the grace period or at all, and there was no evidence binding on the defendant of any agreement to accept the check dated November 17, 1940, or that it would accept the check as absolute or unconditional payment of the premiums. The Court denied the motion and this is assigned as error.

The Court in its instructions to the jury failed to distinguish between conditional and unconditional payment and submitted to it the question of the local cashier's authority to accept the check as absolute payment of the premiums and refused to give certain of defendant's instructions and gave certain other instructions, all of which are assigned as error.

SPECIFICATIONS OF ERROR TO BE RELIED UPON

1. The Court, over the objection of the defendant that the soliciting agent, A. E. Yount, had no authority to bind the Company in respect to the premiums in question and that he had no authority to collect them, and any conversations which he had with the insured were not binding on the Company, permitted the witness A. E. Yount to testify to a conversation he had with the insured relative to the payment of the premiums in question, and the witness in substance stated that he had gone over to deliver to the insured a policy on the insured's boy's life, and in the course of delivering the policy the insured asked about the settlement for it and whether he might arrange for thirty days in which to clear it; that when he had arranged for the policy for the boy he reminded the insured that he must mail a check on his own policies by the 17th, and the insured said: "I will give you a check for it now if you know how much it is." So he told the insured the amount and told him to make the check to the Company (Tr. Page 137-142).

2. The Court over the objection of the defendant that it was incompetent, irrelevant and immaterial and that the testimony with respect thereto did not show

that the entries were made at or about the time of the issuance of the check in question, admitted in evidence the check stub of the check the insured gave in payment of the premiums, which stub contained figures purporting to show a balance in the checking account (Pl. Ex. 6. Tr. Pages 160-162).

3. The Court over the objection of the defendant that the matter was subsequent to the transaction involving the alleged payment of premiums and subsequent to the transaction which the plaintiffs claimed constituted payment, permitted the witness Reta D. Miller to testify in substance that when she got the letter (Pl. Ex. 3) returning the check (Pl. Ex. 4) she got a money order for $49.07 and mailed it to the defendant, and that the money order was returned to her by defendant (Tr. Pages 152-156).

4. The Court over the objection of the defendant that it was something that occurred subsequent to the transaction which plaintiffs claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a letter dated December 2, 1940, from R. A. Durham, cashier, to Warren L. Miller, returning money order sent in by Mrs. Miller (Pl. Ex. 8a. Tr. Pages 123-125).

5. The Court over the objection of the defendant that it was something that occurred subsequent to the

transaction which plaintiffs claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a postoffice money order mailed to the defendant by Mrs. Miller (Pl. Ex. 8c. Tr. Pages 125-127).

6. The Court denied the motion of the defendant at the close of the testimony for an order directing the jury to return a verdict in favor of the defendant, which motion was based on the ground that there was no evidence that the premiums due on October 17, 1940, had been paid when due or during the grace period, or at all; that there was no evidence of any agreement binding upon the defendant that it would accept or that it did accept the check dated November 17, 1940, as absolute or unconditional payment of the premiums in question; that there was no evidence of waiver of the provisions of the policies with respect to payment of the premiums and there was no evidence that the time of the payment of the premiums was extended beyond the grace period or at all (Tr. Pages 213-214).

7. In its charge to the jury the Court said:

> "The controlling question, I am sure you understand—you are veterans in jury service now—the controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

"Now just a word about that. Ordinarily a check is given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. She must satisfy you, by a preponderance of the evidence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence as to the intention of the parties—that means both parties—then your verdict must be for the defendant.

"Now just to state it again, Did Miller intend that the check was being given by him as payment? By that, from his point of view, meaning simply this: That whereas up to that time he had no obligation to pay the insurance premium—I think you understand that clearly; I will mention it again; the lawyers have mentioned it on both sides—in the ordinary insurance transaction, and that is true of this one, there is no obligation to pay the premium. You may pay the premium, and if you do you keep the policy in force; if you don't pay the premium the policy lapses.

"Now the question is in this case, Did Miller intend to bind himself, and did he bind himself, to pay the premium? Was his intention in giving that check, so far as his part of it was concerned, that it should be obligatory upon him and be enforcible against him so that when he executed the check he had in mind that he had committed and obligated himself to pay the premium by giving that check?

"But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. There must be a meeting of the minds, as Mr. Davis said, before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case, did they treat this check differently than the ordinary check, which as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business day after its due date, was it the intention of the defendant in thus dealing with the check treat that as payment; by that I mean to treat that as a binding obligation given to them by Miller, which they could enforce in the way that all obligations are enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle

the plaintiffs to recover in this case, should you so find from a preponderance of the evidence."

(Tr. Pages 221-224.)

The defendant objected to these instructions on the ground that the agents who acted in that regard were not authorized to make any agreement or to accept the check as unconditional payment, and furthermore the instructions referred to payment and omitted the unconditional feature of the payment and omitted to state that a check may be taken as conditional payment, and in that event payment is not finally made unless the remittance is paid (Tr. Pages 224-225).

8. In its charge to the jury the Court said:

"The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

"If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any one of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have authority to bind the company, to accept the check

as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions to you as questions of fact."

(Tr. Pages 224-225.)

The defendant objected to these instructions on the ground that the evidence was uncontradicted as to the authority of R. A. Durham; that it is a matter of law and not a matter of fact or an issue to be submitted to the jury, and the record shows that Mr. Durham had no authority to waive any requirements or rights, that no one had any authority to collect the premiums or to agree to the payment of a premium except in exchange for the Company's official premium receipt (Tr. Page 234).

9. The defendant requested the Court to give the following instructions:

III.

"You are instructed with respect to the time within which the premiums on said policies might be paid that the 31st day after the due date of the premiums due on October 17, 1940, fell on a Sunday, and therefore the insured had all of the next day or all of Monday, the 18th day of November, 1940, within which to pay the premiums due on October 17, 1940.

IV.

"The premiums due on said policies were payable in cash at the Home Office of the Company or to a duly authorized cashier of the company, but only in exchange for the company's official premium receipt signed by certain officers of the company and counter-signed by the person receiving the premiums. No person had any authority to collect a premium unless he then held the official premium receipt.

V.

"The evidence in this case shows that on November 13, 1940, the insured gave to A. E. Yount, a soliciting agent of the defendant, a check payable to the order of the defendant in the amount of premiums due on said policies on October 17, 1940. This check was dated November 17, 1940. There is no evidence that Mr. Yount had the official premium receipts for said policies. You are, therefore, instructed that Mr. Yount had no authority to collect the premiums due on said policies and the giving of the check to Mr. Yount did not constitute payment of the premiums.

VI.

"Under the terms of the policies no agent is authorized to make or modify the policies or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the company's rights or requirements.

VII.

"The plaintiff claims that the check, dated November 17, 1940, and given to Mr. A. E. Yount on November 13, 1940, and subsequently delivered to the cashier's office of the Oregon Branch Office, was accepted by the defendant company as payment of the premiums due on October 17, 1940.

"You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.

"In this connection you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was such an agreement between the insured and the defendant made by a person having authority to make such an agreement.

"You are further instructed that if such an agreement was made by an unauthorized agent, then before such agreement could be binding upon the defendant the agreement must be ratified by a person having authority to do so, and the burden of proof is upon the plaintiffs to show such ratification by a preponderance of the evidence.

VIII.

"The evidence shows that the cashier of the Oregon Branch Office of defendant on November 18, 1940, mailed to the insured the official premium

receipts covering the premiums due on the policies on October 17, 1940. These receipts contained the following condition:

> 'If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the Company.'

"The evidence further shows that the check dated November 17, 1940, for $48.72 was dishonored by the bank on which the check was drawn because the drawer of the check did not have sufficient funds on deposit in the bank to cover the check.

"The mailing of the official premium receipts is not evidence that the company accepted the check as unconditional payment of the premiums, and in view of the evidence that the check was not honored when presented for payment the premium receipts could not be considered as evidence showing payment of the premiums due October 17, 1940.

IX.

"The evidence shows that upon receipt of a letter from the cashier of the Oregon Branch Office of the defendant returning the dishonored check to the insured, the plaintiff, Reta D. Miller, mailed a postoffice money order to the defendant on November 28, 1940. You are instructed that the mailing of this postoffice money order did not constitute payment of the premiums due on the poli-

cies and had no effect whatsoever upon the issues of this case."

(Tr. Pages 237-240.)

The Court refused to give these instructions or any of them, and the defendant objected to this refusal on ground that the requested instructions accurately stated the law and should be given in the form submitted in order to get the defendant's theory before the jury (Tr. Page 235).

ARGUMENT

Specifications of Errors 1 to 5 Inclusive

1. The Court, over the objection of the defendant that the soliciting agent, A. E. Yount, had no authority to bind the Company in respect to the premiums in question and that he had no authority to collect them, and any conversations which he had with the insured were not binding on the Company, permitted the witness A. E. Yount to testify to a conversation he had with the insured relative to the payment of the premiums in question, and the witness in substance stated that he had gone over to deliver to the insured a policy on the insured's boy's life and in the course of delivering the policy the insured asked about the settlement for it and whether he might arrange for thirty days in which to clear it; that when he had arranged for the policy for the boy he reminded the insured that he must mail a check on his own policies by the 17th, and the insured said: "I will give you a check for it now if you know how much it is." So he told the insured the amount and told him to make the check to the Company (Tr. Page 137-142).

2. The Court over the objection of the defendant that it was incompetent, irrelevant and immaterial that the testimony with respect thereto did not show that

the entries were made at or about the time of the issuance of the check in question, admitted in evidence the check stub of the check the insured gave in payment of the premiums, which stub contained figures purporting to show a balance in the checking account (Pl. Ex. 6. Tr. Pages 160-162).

3. The Court over the objection of the defendant that the matter was subsequent to the transaction involving the alleged payment of premiums and subsequent to the transaction which the plaintiffs claimed constituted payment, permitted the witness Reta D. Miller to testify in substance that when she got the letter (Pl. Ex. 3) returning the check (Pl. Ex. 4) she got a money order for $49.07 and mailed it to the defendant, and that the money order was returned to her by defendant (Tr. Pages 152-156).

4. The Court over the objection of the defendant that it was something that occurred subsequent to the transaction which plaintiff claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a letter dated December 2, 1940, from R. A. Durham, cashier, to Warren L. Miller, returning money order sent in by Mrs. Miller (Pl. Ex. 8a. Tr. Pages 123-125).

5. The Court over the objection of the defendant that it was something that occurred subsequent to the

transaction which plaintiffs claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a postoffice money order mailed to the defendant by Mrs. Miller (Pl. Ex. 8c. Tr. Pages 125-127).

POINTS AND AUTHORITIES

Evidence to be admissible must correspond with the substance of the material allegations and be relevant to the questions in dispute. Collateral questions should be avoided.

Sec. 2-226, *O.C.L.A.*
20 American Jurisprudence, Page 238, Sec. 245

Argument

Sec. 2-226, *O.C.L.A.* provides as follows:

> "Evidence shall correspond with the substance of the material allegations, and be relevant to the questions in dispute. Collateral questions shall therefore be avoided. It is, however, within the discretion of the Court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

The rule is stated in *20 American Jurisprudence*, Page 238, Sec. 245 as follows:

> "Evidence offered by either party in the trial of the case, to be admissible against the objection of the other party, must be relevant to the issues of the case and tend to establish or disprove them; matters which are wholly irrelevant and which are incapable of affording any legitimate presumption or inference regarding the fact or facts in issue must be excluded."

The general proposition that evidence to be admissible must be relevant to the questions in dispute is so well settled that citation of further authorities is deemed unnecessary. It remains to apply the proposition to the particular case.

In this case the question to be determined was whether the policies of insurance were in force on the date of the death of the insured. This depended on whether the premiums due on October 17, 1940, had been paid. In the Pre-Trial Order the admitted facts showed that on November 13, 1940, A. E. Yount, a soliciting agent of the defendant called on the insured at McMinnville, Oregon, at which time the insured gave to Mr. Yount a check dated November 17, 1940, payable to the order of the defendant in the amount of the premiums; that Mr. Yount returned to Portland and turned the check over to the defendant's cashier,

who held it until Monday, November 18, 1940, (November 17, 1940, fell on Sunday) when he entered it upon his records, mailed out the official premium receipts, and deposited the check; that when the check reached the bank upon which it was drawn it was dishonored for insufficient funds; that when the check was returned to the cashier's office he took up the returned check and mailed it to the insured and requested that he return the official premium receipts (Tr. Pages 37-39).

The plaintiff contended that the check was accepted by the defendant as full payment of the premiums (Tr. Page 46). The defendant contended that there was no agreement either by an authorized or unauthorized person to accept the check as unconditional payment, and that the check was accepted conditionally upon the check being honored when presented for payment (Tr. Page 47). These contentions set out the issue to be tried and the result of the case depended upon this issue and nothing else.

The trial Court permitted the witness A. E. Yount to testify with respect to the delivery of another policy to the insured on the insured's boy's life and with respect to the settlement of the premium on that policy and the securing of a check from the insured in payment of the premiums in question. There was nothing

in this transaction relevant to whether the check was either given or accepted as unconditional payment of the premiums in question and this testimony in no way tended to prove or contradict the contentions of either party. Furthermore, the agent had no authority to collect these premiums. It was agreed in the applications for the policies "that the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon * * * * * *." (Tr. Pages 99 and 109.)

The trial Court admitted into evidence the check stub of the check issued by the insured in payment of the premiums. This check stub showed a balance carried forward after deducting the amount of the check. The only purpose this stub could serve was to show that the insured computed a sufficient amount in the bank to honor the check. There was no showing as to when the entry on the stub was made. The entry did not tend to prove or disprove whether the check was given or accepted as unconditional payment of the premiums. Assuming that the exhibit proved that the insured thought he had sufficient money on deposit to honor the check, there was no showing that it was called to defendant's attention, and even if it had been it would not bear on the question of whether the defendant accepted the check unconditionally.

The trial Court permitted the witness Reta D. Miller to testify that when the defendant returned the dishonored check and requested a return of the official premium receipts she secured a postoffice money order for the amount of the premiums and interest and mailed it to defendant. The Court also admitted in evidence as exhibits the postoffice money order and a letter from the defendant returning the money order.

This testimony by Mrs. Miller and the exhibits all referred to matters which occurred subsequent to the transaction which the plaintiffs claimed constituted the giving and acceptance of the check as unconditional payment of the premiums. Such evidence did not tend to prove or disprove whether the check was accepted conditionally or unconditionally. If the check was accepted as plaintiffs contended the act of acceptance was completed when the defendant accepted the check, if it did. Anything that transpired subsequent to the return of the dishonored check to the insured would have no bearing upon the questions in dispute.

The admission of the evidence referred to in Specifications of Error 1 to 5 inclusive could serve no other purpose than to confuse the issues and prejudice the cause of the defendant in the eyes of the jury, and appellant believes that it did so confuse and prejudice the jury, and that its admission by the Court constituted error which justifies the reversal of this case.

ARGUMENT

Specification of Error 6

6. The Court denied the motion of the defendant at the close of the testimony for an order directing the jury to return a verdict in favor of the defendant, which motion was based on the ground that there was no evidence that the premiums due on October 17, 1940, had been paid when due or during the grace period, or at all; that there was no evidence of any agreement binding upon the defendant that it would accept or that it did accept the check dated November 17, 1940, as absolute or unconditional payment of the premiums in question; that there was no evidence of waiver of the provisions of the policies with respect to payment of the premiums and there was no evidence that the time of the payment of the premiums was extended beyond the grace period or at all (Tr. Pages 213-214).

POINTS AND AUTHORITIES

1. Payment of a premium is not effected by the mere giving of a check, but is conditioned upon the check being honored when presented for payment in the absence of an agreement to accept the check as unconditional payment.

Smith v. Mills, 112 Ore. 496; 230 Pac. 350

Johnson v. Iankovetz, 57 Ore. 24; 110 Pac. 398

Seaman v. Muir, 72 Ore. 583; 144 Pac. 121

Kansas City Life Ins. Co. v. Davis, C.C.A. 9th Circuit, 95 Fed. (2d) 952

Texas Mutual Life Insurance Association v. Tolbert, 134 Texas 419; 136 S. W. (2d) 584

Wohrman v. Equitable Life Assurance Society, 1 N. Y. Supplement (2d) 331

48 Corpus Juris, Pages 617, 619

29 American Jurisprudence, Page 342

Couch Cyclopedia of Insurance Law, Vol. 3, Sec. 603

2. The burden is upon the person claiming that a check was accepted as payment to prove an agreement to accept the check as payment by clear and satisfactory evidence.

Joppa v. Clark Commission Co., 132 Ore. 21; 281 Pac. 834

Turner v. New York Life Insurance Co., C.C.A. 8th Circuit; 100 Fed. (2d) 193

Central States Life Insurance Co. v. Johnson, 181 Okla. 367; 73 Pac. (2d) 1152

Naylor v. Illinois Bankers Life Assurance Co., 199 Ark. 463; 134 S. W. (2d) 13

Hare v. Connecticut Mutual Life Insurance Co., 114 W. Va. 679; 173 S. E. 772

Philadelphia Life Insurance Co. v. Hayworth, C.C.A. 4th Circuit; 296 Fed. 339

Great Southern Life Insurance Co. v. Brooks, 166 Okla. 123; 26 Pac. (2d) 430

Hayworth v. Philadelphia Life Insurance Co., 190 N.C. 757; 130 S. E. 612

Argument

The policies of insurance involved herein (Pl. Ex. 1 and 2) provided for the payment of quarter annual premiums. A premium became due on each policy on October 17, 1940. The policies provided for a grace period of thirty-one days. The policies further provided that all premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized cashier of the Company, but only in exchange for the Company's official prem-

ium receipt, and no person had any authority to collect a premium unless he then held the official premium receipt. The policies further provided that no agent was authorized to make or modify the contract or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or the Company's rights or requirements (Tr. Pages 19-21 and 27-29).

The applications which were made a part of the contract provided that only the President, a Vice-President, a Secretary or the Treasurer of the Company could make, modify or discharge contracts or waive any of the Company's rights or requirements. (Tr. Pages 99 and 109-110.)

The evidence showed that on November 13, 1940, the insured at McMinnville, Oregon, gave to A. E. Yount, a soliciting agent of defendant, a check payable to the defendant in the amount of the quarter annual premiums due October 17, 1940. The check was dated November 17, 1940, which day fell on Sunday. Mr. Yount did not have the official premium receipts with him. He returned to Portland and turned the check over to the cashier's office of the Oregon Branch Office. The check was held by the cashier's office until Monday, November 18, 1940, which was the first banking day after the date of the check. Neither the banks nor the cashier's office were open on Sun-

day. The check was deposited on November 18, 1940, and the cashier on that day made his entries on his record and mailed to the insured the official premium receipts. These receipts provided:

> "If remittance otherwise than in cash has been made this receipt shall be void if payment of such remittance is not actually received by the Company."

The check reached the bank on which it was drawn and was presented for payment on November 20, 1940. It was dishonored because of insufficient funds. The check was returned to the cashier's office by the bank in which it had been deposited on Monday, November 25, 1940. On the next day the cashier returned the check by mail to the insured and requested that the official premium receipts be returned to him and advised the insured that the policies had lapsed, and he then reversed the entries made by him on November 18, 1940.

The Oregon Supreme Court in *Seaman v. Muir*, 72 Ore. 583; 144 Pac. 121, in a case involving the sale of property, said:

> "Moreover, the execution and delivery of negotiable paper is not payment unless the same is accepted by the parties in that sense."

In *Johnson v. Iankovetz*, 57 Ore. 24; 110 Pac. 398, the Oregon Supreme Court in a case involving the sale

of two guns where payment was made by check held that the delivery of the guns to the purchaser was conditional upon the check being honored, and the purchaser acquired no title to them when the check was dishonored.

In *Smith v. Mills,* 112 Ore. 496; 230 Pac. 350, the plaintiff was the owner of a certain note and mortgage and sold and assigned the same to the defendant. The defendant gave plaintiff a check in payment. Upon presentation of the check for payment, payment was refused, the bank having closed its doors prior to the presentment. The Oregon Supreme Court said:

> "In the absence of any agreement, either expressed or clearly implied, payment means the discharge of a debt or obligation in money, and in such case money is the sole medium of payment. (citing cases)
>
> "But anything of value delivered by the debtor and accepted by the creditor in discharge of the debt will constitute payment. (citing cases) In such case it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment.
>
> * * * * * * * * * * * * *
>
> "In order that the acceptance of the cashier's check shall discharge the debt, the transfer must be by an agreement of the parties with that intention. (citing cases)"

In *Texas Mutual Life Insurance Association v. Tolbert,* 134 Tex. 419; 136 S. W. (2d) 584, a check was sent to the company in payment of an assessment. Credit was given upon the books of the company. The check was dishonored when presented for payment because of insufficient funds. The Texas court held that the acceptance by a life insurance association of a check covering an assessment and deposit of the check for collection did not prevent a forfeiture of the certificate for non-payment where the check was dishonored, since crediting of the check on the association books did not constitute an unconditional payment of the assessment. A check sent by the insured to cover an assessment on the life certificate was accepted only conditionally and the burden rested on the insured to see that the check was honored when presented.

In *Wohrman v. Equitable Life Assurance Society,* 1 N. Y. Supplement (2d) 331, on the last day of grace the wife of plaintiff delivered to the teller of the defendant his check for the amount of the premium. A receipt was given which provided that it would not be binding until the defendant received the actual cash called for by the remittance. The defendant deposited the check and it was returned by the plaintiff's bank because of insufficient funds. The defendant immediately returned the check to the plaintiff with notice that the

policy had lapsed. Subsequently the plaintiff made a tender of the amount of the premium. The New York court held that the check was not in absolute payment of the premium, and was conditioned upon its payment by the plaintiff's bank, and that the defendant was justified in standing upon its rights and in declaring the policy lapsed when the check was returned to it unpaid.

In *48 Corpus Juris* on Page 617 the rule is stated as follows:

> "The delivery to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, in the absence of any agreement or consent to receive it as payment, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him."

In *48 Corpus Juris* on Page 619 it is stated:

> "A check is accordingly often referred to as conditional payment, the condition being its collectibility from the bank upon which it is drawn."

In *29 American Jurisprudence,* Page 342, is the following:

> "The mere receipt of a check will not prevent a forfeiture of the policy for non-payment of premium, but if the check is accepted as payment of the premium, even though it turns out to be worthless, there is payment which will prevent a for-

> feiture. The crux of the situation appears to be the question of acceptance. If the check is not received or accepted as payment, or pleaded as such, or ever paid, and the insured did not at any time after the check was drawn have funds in the drawee bank sufficient to pay it, the mailing and sending of the check is not a payment."

Vol. 3, *Couch Cyclopedia of Insurance Law*, Sec. 603, states:

> "Generally speaking, payment of a premium is not effected by the mere giving of a check or draft, at least in the absence of an express agreement to the contrary. In other words, the mere sending and receipt of a check or certificate of deposit for the amount of a premium does not operate as a payment thereof in the absence of agreement, waiver or estoppel, unless it is accepted as such. Nor does the mere acceptance of a check conditional upon payment thereof when presented of itself effect payment * * * * * *."

In *Joppa v. Clark Commission Co.*, 132 Ore. 21; 281 Pac. 834, the Oregon Supreme Court held that a promissory note or check given for an antecedent debt does not discharge the obligation in the absence of an agreement, express or implied, between the parties that it shall be given and accepted as payment, and that when a debtor gives his check for the amount of his indebtedness the *prima facie* presumption arises that the check is taken merely as conditional, not absolute payment.

The court also held that the mutual intention of the parties that a check shall be given and received as payment may be established by proof either of an express contract or a contract implied in fact, but in either case it must be proved by *clear and satisfactory* evidence.

In *Turner v. New York Life Insurance Co.*, 100 Fed. (2d) 193, toward the end of the grace period an arrangement was made whereby the remaining loan value on the policy would be utilized, and the loan plus the payment of $130.83 would cover interest due on earlier loans and the premium due on the policy. The insured gave her check for $130.83 stating in substance that at the time there were not sufficient funds in the bank to cover it but that there would be in a few days. The check was dated May 1st, 1934. It was deposited on May 7th. On May 11th or 12th the check was returned to the company because of insufficient funds. The company notified the insured of the return of the check and that it would be deposited again. The check was again returned. On May 15th the company placed the check in a letter addressed to the insured and stated that because of the dishonor of the check the premium had not been paid and the policy had lapsed and urged that an application for reinstatement be made. It was contended that the premium had been paid because

the check was accepted as unconditional payment and that therefore the company could not lapse the policy but could only sue upon the check. The 8th Circuit Court of Appeals applied the Missouri law to the effect that in the absence of an agreement between the parties that it is to be received as payment, the common law rule is that a draft or bill of exchange, acceptance, order or promisory note of the debtor, is not a payment or extinguishment of the original demand. Also, it is the general doctrine that the burden of proof to show that a special agreement to accept a check as absolute payment existed is upon the one so alleging. The court then said:

> "In this situation the applicable rules of law are that the receipt of this check by the company was a conditional payment unless plaintiff is able to produce substantial proof that the check was accepted as absolute payment. The proof is not only lacking but the proof is directly to the contrary."

In *Central States Life Insurance Co. v. Johnson*, 181 Okla. 367; 73 Pac. (2d) 1152, on the day before the policy would have lapsed the company received through the mail a check from the insured in payment of the premium. The company credited the insured's account and in due course transmitted the check for collection. The check was returned because of insufficient funds and it was charged to the insured's account. After the

check was returned the company notified the insured by letter that his policy had lapsed for non-payment of the premium; that the credit had been reversed on the books, and that the receipt formerly mailed to him was null and void, and also advised him that he was privileged to ask for reinstatement. The Oklahoma Supreme Court in its opinion said:

> "Although the provision in a life policy for the payment of premium is not, in the strict sense, a debt, if the insured is to receive protection under the insurance contract, the insurer is not deprived of the right to consider a check given in payment of that protection as a conditional payment only, depending upon payment on due presentation. A check is never presumed to constitute payment of any obligation. The presumption is that it is accepted only conditionally upon its due payment. See *48 C. J.* 703. The burden is upon the one charging unconditional acceptance to show such acceptance. For the apparent purpose of avoiding undue hardship arising from the forfeiture of a policy, the courts have not required proof of an express agreement, as in case of debt, to accept unconditionally a check in payment of premiums, but have held that the insured or his beneficiary may prove acts, other than an express agreement, on the part of the insurer showing unconditional acceptance.
>
> "The defendant's evidence shows that on receipt of the check it mailed to the insured a receipt wherein the acceptance of the check was made conditional upon due payment thereof. Had it been admitted that this receipt was delivered to the

insured, the facts here would have been very similar to the facts in the case of *Great Southern Life Ins. Co. v. Brooks, supra.* There it was held that the trial court erred in not instructing a verdict for the defendant.

"The question of the conditional receipt is of no material consequence in cases of this character unless the plaintiff has produced evidence to establish his case sufficient for the jury's consideration. If plaintiff produce such evidence, and the issuance and delivery of the receipt is disputed, then there arises a question for the jury's determination. Its decision on such conflicting evidence would be binding on this court. But the plaintiff must produce evidence of the defendant's intention to accept the check unconditionally. That burden was upon her. There is no presumption favoring her contention. There is no burden upon the defendant to show its real intention unless she first establish her case. According to the clear holding in the Brooks case, above, an insurer may accept a personal check in payment of a life insurance premium, but such acceptance is conditional, in the absence of a contrary intention, upon due payment of the check. We hold that the presumption of conditional acceptance favors the insurer and that the burden is upon the insured or his beneficiary to prove a contrary intention on the part of the insurer.

"The acts of the insurer in accepting a check and attempting to cash the same in due course are insufficient evidence of an unconditional acceptance thereof in payment of a life premium. Such evidence is too conjectural to be submitted to a jury."

In *Naylor v. Illinois Bankers Life Assurance Co.*, 199 Ark. 463; 134 S. W. (2d) 13, the insured on April 27, 1938, mailed a check in payment of the premium due April 1, 1938, which check was received by the company on April 29, 1938. The company mailed a conditional receipt. The check was returned because of insufficient funds. The company notified the insured that the policy had lapsed and suggested he make application for reinstatement. The insured then sent a postoffice money order to cover the check, but the same was rejected. He later sent a cashier's check which was likewise rejected. The Arkansas Supreme Court held that the payment must be treated as conditional and not as absolute payment of the premium.

The cases, *Philadelphia Insurance Co. v. Hayworth*, 296 Fed. 339, and *Hayworth v. Philadelphia Insurance Co.*, 190 N. C. 757; 130 S. E. 612, involved the same parties and the same policy. The case was first started in the state court, which was removed to the Federal Court. After an adverse decision in the District Court the company appealed and the Circuit Court of Appeals for the 4th Circuit reversed and remanded the case. The plaintiff took a voluntary non-suit and started over in the state court, keeping the demand lower than the jurisdictional amount for the removal to the Federal Court.

The facts of the cases show that when the second premium became due the insured paid defendant some cash and delivered to the company three notes of $25.00 each. The notes provided that if not paid at maturity all further liability under the policy should immediately cease and determine. When the second note became due the company agreed to extend its payment to June 6, 1922, upon receipt of an approved personal health certificate and a check for $25.00 post dated June 6, 1922, and on receipt thereof advised the insured by letter that it had extended the time for the payment of the note to June 6, 1922, on which date the check would be deposited. The check was written May 8, 1922, and was deposited for collection June 7, 1922, and was presented at the payee bank on June 9, 1922. Payment was refused because of insufficient funds. The Circuit Court of Appeals in its opinion said:

> "In some comments filed by the learned judge below at or about the same time he allowed the writ of error, he expressed the opinion that defendant had accepted in payment of the note of March 24th the post dated check and had relinquished its right to forfeit the policy for non-payment of the former instrument. This view is strongly urged upon us by the able and zealous counsel for the defendant. The letter of May 11th makes clear that the defendant did not at that time accept the check as payment of the note, for it said it would hold the latter until the date the check bore. It

is urged that the return of the note to the insured at the same time defendant deposited the check amounts to a non-conditional acceptance by it of the check as payment of the note. To our apprehension the law is clearly otherwise. An agreement that a check is received in satisfaction of a note is not implied from the surrender or cancellation of the note. Until the check was paid the note was in force, and unless it was paid at the time to which it was extended, the policy was by its terms forfeited. Forfeitures, it is true, are not favored in the law, but promptness of payment is essential in the business of life insurance. *New York Life Insurance Co. v. Statham*, 92 U. S. 24; 23 L. Ed. 789. If there is any real ambiguity in the provisions of a policy providing for forfeiture for non-payment, they will, of course, be resolved against the insurer, but if their meaning to the ordinary reader is plain, there is no reason why they should not be enforced. *New York Life Insurance v. Statham*, 92 U. S. 24; 23 L. Ed. 789; *Thompson v. Insurance Co.*, 104 U. S. 252; 26 L. Ed. 765; *Knickerbocker Life Insurance Co. v. Pendleton*, 112 U. S. 696; 5 Sup. Ct. 314; 28 L. Ed. 866; *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335, 348; 23 Sup. Ct. 126; 47 L. Ed. 204."

The North Carolina Court referred to and approved the opinion of the Circuit Court of Appeals and in its opinion said:

"The premium note was not paid. A worthless check is not a payment. There is no fact in the complaint that tends to show that the check was

> accepted as payment. It was a conditional payment, and when it was not paid the condition which prevented it from operating as a payment happened and the policy lapsed. The failure to have the funds in the bank to meet the check was the fault of the drawer, and no loss resulted from any delay on the part of the payee."

The case of *Kansas City Life Insurance Co. v. Davis*, C.C.A. 9th Circuit; 95 Fed. (2d) 952, states the rule as follows:

> "The law is settled that a check made in payment of insurance premiums is taken conditionally and subject to its return in cash, unless there is a special agreement that such check is received in absolute payment."

It should be noted that in that case the company received the insured's check and four days later deposited it in the bank for collection and forwarded certificates of reinstatement to the insured with a letter stating that the application for reinstatement had been approved and it had accepted the deposit tendered in payment of the premiums. The Court said on Page 957:

> "There is no evidence in this case supporting a special agreement to take this check as absolute payment."

The above authorities clearly establish the rule that a check made in payment of insurance premiums is taken conditionally and subject to its return in cash,

unless there is a special agreement that the check is received as absolute payment, and that the burden is upon the one so asserting to show such an agreement by substantial evidence. The plaintiffs in this case have the burden of showing first that there was an agreement to accept the check as absolute payment, and second, that the agreement was made by one having authority to so accept the check.

It is appellant's contention that the evidence in this case utterly fails to show an agreement to accept the check as absolute payment, but to the contrary did show that the check was received conditional upon it being honored when presented. Furthermore, even though it could be said from this evidence that the cashier agreed to accept the check as absolute payment, there is no evidence showing that he had authority to so accept the check. To the contrary the evidence showed by the policies themselves that he had no such authority. The question of the cashier's authority is further discussed under Specification of Error 8.

It is appellant's contention that at the close of the case when it moved for a directed verdict the Court should have allowed the motion, and that its failure to do so constitutes error, and this Court should reverse the trial court and direct that a judgment be entered in favor of the defendant on both causes of action.

ARGUMENT

Specification of Error 7

7. In its charge to the jury the Court said:

"The controlling question, I am sure you understand—you are veterans in jury service now—the controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

"Now just a word about that. Ordinarily a check is given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. She must satisfy you, by a preponderance of the evidence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence as to the intention of the parties—that means both parties—then your verdict must be for the defendant.

"Now just to state it again, Did Miller intend that the check was being given by him as payment? By that, from his point of view, meaning simply this: That whereas up to that time he had no obligation to pay the insurance premium—I think you understand that clearly; I will mention it again; the lawyers have mentioned it on both sides—in the ordinary insurance transaction, and that is true of this one, there is no obligation to pay the premium. You may pay the premium, and if you do you keep the policy in force; if you don't pay the premium the policy lapses.

"Now the question is in this case, Did Miller intend to bind himself, and did he bind himself, to pay the premium? Was his intention in giving that check, so far as his part of it was concerned, that it should be obligatory upon him and be enforcible against him so that when he executed the check he had in mind that he had committed and obligated himself to pay the premium by giving that check?

"But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. There must be a meeting of the minds, as Mr. Davis said, before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case, did they treat this check differently than the ordinary check, which as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business

day after its due date, was it the intention of the defendant in thus dealing with the check treat that as payment; by that I mean to treat that as a binding obligation given to them by Miller, which they could enforce in the way that all obligations are enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle the plaintiffs to recover in this case, should you so find from a preponderance of the evidence."

(Tr. Pages 221-224.)

The defendant objected to these instructions on the ground that the agents who acted in that regard were not authorized to make any agreement or to accept the check as unconditional payment, and furthermore the instructions referred to payment and omitted the unconditional feature of the payment and omitted to state that a check may be taken as conditional payment, and in that event payment is not finally made unless the remittance is paid (Tr. Pages 234-235).

Argument

As shown by the authorities cited under Specification of Error 6, a check made in payment of insurance

premiums is taken conditionally and subject to its payment in cash unless there is a special agreement that such check is received in absolute payment. The trial Court in submitting this case to the jury gave the above instruction. The instruction as given stated that the controlling question was whether the check was given and accepted as payment of the premium. The instruction did not distinguish between conditional and unconditional payment. While the instruction did say that ordinarily a check is given and accepted in business transactions conditional on its being paid, it did not in referring to the payment of the premiums involved distinguish between conditional and unconditional payment so that the jury would understand that before they could bring in a verdict for plaintiffs they must find from the evidence that there was an agreement on behalf of the defendant to accept the check as unconditional payment, and that such agreement was made by one authorized to bind the defendant.

The instruction in referring to payment asks the jury to find whether the insured intended that the check was given by him in payment. Again it did not distinguish between conditional and unconditional payment. It further stated that the question in the case

is whether the insured bound himself to pay the premium—whether he intended in giving the check that it should be obligatory upon him to pay the premium. This was not the question in the case. The question in the case was whether there was an agreement to accept the check as unconditional payment, and this instruction did not fairly present that question to the jury.

ARGUMENT

Specification of Error 8

8. In its charge to the jury the Court said:

> "The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you, gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.
>
> "If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have authority to bind the company, to accept the check as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions to you as questions of fact."

(Tr. Pages 224-225.)

The defendant objected to these instructions on the ground that the evidence was uncontradicted as to the authority of R. A. Durham; that it is a matter of law and not a matter of fact or an issue to be submitted

to the jury, and the record shows that Mr. Durham had no authority to waive any requirements or rights, that no one had any authority to collect the premiums or agree to the payment of a premium except in exchange for the Company's official premium receipt (Tr. Page 234).

POINTS AND AUTHORITIES

The insured was bound by the limitations of authority in the policies of insurance:

29 American Jurisprudence, Page 621, Sec. 817

Cranston v. West Coast Life Insurance Co., 63 Ore. 427; 128 Pac. 427

Bartnick v. Mutual Life Insurance Company of New York, 154 Ore. 446; 60 Pac. (2d) 943

New York Life Insurance Co. v. McCreary, C.C.A. 8th Circuit; 60 Fed. (2d) 355

ARGUMENT

In the application for the policies which were made a part of the contracts it was mutually agreed that only the President, a Vice-President, a Secretary or the Treasurer of the Company could make, modify, or discharge contracts.

The policies in addition to the provisions in the application provided that no agent was authorized to make or modify the contract or to extend the time for the payment of the premiums, or to waive any lapse or forfeiture or any of the Company's rights or requirements, and provided that all premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized cashier of the Company, but only in exchange for the Company's official premium receipts signed by the President, a Vice-President, a Secretary or the Treasurer of the Company and countersigned by the person receiving the premium.

In *Cranston v. West Coast Life Insurance Co.*, 63 Ore. 427; 128 Pac. 427, the application for the policy contained restrictions relative to the authority of the agent. The plaintiff relied upon the act of the agent in taking a note payable to himself as payment of the premium. The Oregon Supreme Court said:

> "In the face of his own agreement in the application authorizing such conditions and his acceptance of the policy, the insured had no right to deal with Thurston in any way inconsistent with these terms for they acted as limitations on the authority of the soliciting agent within the knowledge of the assured."

In *Bartnick v. Mutual Life Insurance Company of New York*, 154 Ore. 446; 60 Pac. (2d) 943, the Oregon Supreme Court with respect to the question of a limitation on the agent's authority contained in the policy said:

> "The insured is bound to know the terms of his policy."

In this case there is no evidence whatsoever that R. A. Durham had any authority to waive the requirements of the policy with respect to payment or to agree that the Company would accept a check as absolute payment of the premium. The evidence is entirely to the contrary and to the effect that he only accepted the check conditional upon its being honored when presented for payment.

Under the conditions of this case it was error for the trial court to submit to the jury the question of Mr. Durham's authority. It was a question of law for the Court to determine, and under the facts the Court should have held that Mr. Durham had no authority to accept the check as absolute or unconditional payment.

ARGUMENT

Specification of Error 9

9. The defendant requested the Court to give the following instructions:

III.

"You are instructed with respect to the time within which the premiums on said policies might be paid that the 31st day after the due date of the premiums due on October 17, 1940, fell on a Sunday, and therefore the insured had all of the next day or all of Monday, the 18th day of November, 1940, within which to pay the premiums due on October 17, 1940.

IV.

"The premiums due on said policies were payable in cash at the Home Office of the Company or to a duly authorized cashier of the company, but only in exchange for the company's official premium receipt signed by certain officers of the company and counter-signed by the person receiving the premiums. No person had any authority to collect a premium unless he then held the official premium receipt.

V.

"The evidence in this case shows that on November 13, 1940, the insured gave to A. E. Yount, a soliciting agent of the defendant, a check pay-

able to the order of the defendant in the amount of premiums due on said policies on October 17, 1940. This check was dated November 17, 1940. There is no evidence that Mr. Yount had the official premium receipts for said policies. You are, therefore, instructed that Mr. Yount had no authority to collect the premiums due on said policies and the giving of the check to Mr. Yount did not constitute payment of the premiums.

VI.

"Under the terms of the policies no agent is authorized to make or modify the policies or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the company's rights or requirements.

VII.

"The plaintiff claims that the check, dated November 17, 1940, and given to Mr. A. E. Yount on November 13, 1940, and subsequently delivered to the cashier's office of the Oregon Branch Office, was accepted by the defendant company as payment of the premiums due on October 17, 1940.

"You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.

"In this connection you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was such an agreement between the insured and the defendant made by a person having authority to make such an agreement.

"You are further instructed that if such an agreement was made by an unauthorized agent, then before such agreement could be binding upon the defendant the agreement must be ratified by a person having authority to do so, and the burden of proof is upon the plaintiffs to show such ratification by a preponderance of the evidence.

VIII.

"The evidence shows that the cashier of the Oregon Branch Office of defendant on November 18, 1940, mailed to the insured the official premium receipts covering the premiums due on the policies on October 17, 1940. These receipts contained the following condition:

> 'If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the Company.'

"The evidence further shows that the check dated November 17, 1940, for $48.72 was dishonored by the bank on which the check was drawn because the drawer of the check did not have sufficient funds on deposit in the bank to cover the check.

"The mailing of the official premium receipts is not evidence that the company accepted the check as unconditional payment of the premiums, and in view of the evidence that the check was not honored when presented for payment the premium receipts could not be considered as evidence showing payment of the premiums due October 17, 1940.

IX.

"The evidence shows that upon receipt of a letter from the cashier of the Oregon Branch Office of the defendant returning the dishonored check to the insured, the plaintiff, Reta D. Miller, mailed a post office money order to the defendant on November 28, 1940. You are instructed that the mailing of this postoffice money order did not constitute payment of the premiums due on the policies and had no effect whatsoever upon the issues of this case."

(Tr. Pages 237-240.)

The Court refused to give these instructions or any of them, and the defendant objected to this refusal on the ground that the requested instructions accurately stated the law and should be given in the form submitted in order to get the defendant's theory before the jury (Tr. Page 235).

Argument

In its requested instructions the appellant correctly and accurately stated the law as applicable to this case as outlined in the authorities quoted under the above assignments of error. While the trial court gave portions of some of the instructions it did so in such a manner that the jury could not have accurately determined the law applicable to the facts of the case or the defendant's theory of the case. It is the appellant's contention that the refusal of the Court to give each of the instructions as requested constituted error.

CONCLUSION

It is appellant's contention that the trial court should have allowed its motion for a directed verdict at the conclusion of the testimony. There was no testimony to sustain plaintiffs' contention that the check which the insured gave in payment of the premiums was accepted as absolute or unconditional payment. This Court should reverse the trial court and direct that a judgment be entered in favor of appellant on both causes of action.

If the Court is of the opinion that the appellant was not entitled to a directed verdict, then the case should be reversed and a new trial granted in view of the error of the trial court admitting prejudicial testimony on irrelevant matters and in view of errors in the instructions to the jury.

Respectfully submitted,

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